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Supreme Court, U.S.
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No. 00-524

IN THE
Supreme Court of the United States

MICHAEL BARFUS, *et al.*,

Petitioners,

v.

CITY OF MIAMI, a municipal corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Since 1977, the City of Miami ("City") has operated under a court-approved, court-enforced consent decree, an affirmative action program resulting from the settlement of a lawsuit brought by the United States of America against the City to remedy past practices of discrimination in the hiring and the promotion of minorities and to eliminate illegal discrimination in the employment practices of the City. (App. 15-37). The firefighters' union, the International Association of Firefighters, AFL-CIO Local 587, participated in the negotiations and in 1978 signed the decree. *See Barfus v. City of Miami*, 936 F.2d 1182, 1184 (11th Cir. 1991). The consent decree has governed the hiring and promotional practices of the City until 1997, when the Eleventh Circuit Court of Appeals instructed the district court to dissolve the consent decree provisions relating to promotions. *See United States v. City of Miami*, 115 F.3d 870, 874 (11th Cir. 1997).

In 1979, the City amended its civil service rules to enhance the employment opportunities for minorities and to help meet the promotional goals established by the consent decree by adopting Ordinance No. 8977. (App. 26, 28-29). Ordinance No. 8977 includes the so-called "Rule of Eight", a certification procedure for promotions described in footnote 2 on pages 4 and 5 of the Petition. In 1983, the Rule of Eight was approved by the district court as being consistent with the goals of the consent decree. *See United States v. City of Miami*, 195 F.3d 1292, 1296 n.2 (11th Cir. 1999), *cert. denied*, __ U.S. __, 148 L. Ed. 2d 20 (2000) (U.S. Oct. 2, 2000) (No. 99-1858).

On October 28, 1987, while the consent decree was in full force and effect, seven white, non-Hispanic male City

of Miami firefighters, including Petitioner Michael R. Barfus (collectively, "Firefighters"), filed a complaint against the City, seeking a permanent injunction and other remedial relief under Title VII of the Civil Rights Act of 1964. They alleged that the City discriminated against them in favor of less qualified minorities in that they, as white, non-Hispanic males, were the only persons who successfully passed the 1985 City of Miami fire lieutenant promotional exam who were not promoted to the rank of fire lieutenant, and that the reason they were not promoted was because of their race and ethnicity. The Firefighters further alleged that by exceeding the promotional goal of 38% minorities authorized by the consent decree, the City had transformed its affirmative action program into a form of reverse discrimination.

On May 25, 1989, the district court dismissed the Firefighters' complaints as impermissible collateral attacks on the consent decree, concluding that since the plaintiffs were all members of the firefighters' union which had participated in the negotiations and had signed on to the consent decree, their sole remedy was to bring civil contempt proceedings against the City in the court which had jurisdiction over the decree.

On appeal, the Eleventh Circuit Court of Appeals reversed and remanded, determining that the Title VII complaints did not constitute collateral attacks on the consent decree because the Firefighters were not seeking relief pursuant to the decree or seeking to modify the decree, and that individual firefighters did not waive their right to bring independent actions under Title VII simply because of their union's participation in the consent decree negotiations and its signature on the decree. *See Barfus*, 936 F.2d at 1185-86.

However, the Court of Appeals set legal boundaries for the Firefighters' actions, making it clear that the Firefighters could proceed under Title VII to prove injury allegedly caused by the City's discriminatory application of the consent decree, but they could not seek relief pursuant to the decree itself. *See id.* at 1188-89.

On remand to the district court, the parties stipulated to the facts and submitted memoranda of law in support of their respective positions. The district court entered final judgment in favor of the City, finding no unlawful application of the consent decree or violation of Title VII of the Civil Rights Act of 1964 in the City's failure to promote the Firefighters. (App. 58-63).

The district court concluded that the City did not discriminate against the non-Hispanic white male Firefighters in not promoting them, since the City did not exceed the promotional goals authorized by the consent decree in promoting more than 38% minority candidates to fire lieutenant. The court reasoned that under the provisions of paragraph 5(b) of the consent decree (App. 28), the 38% goal related to the fire department as a whole, and not to any particular promotional register or category within the department; and that according to the record evidence, minorities and women received only about 32% percent of the promotions in the department during the relevant time period. The district court noted further that there was a legitimate basis under the consent decree for the City's application of Civil Service Rule 8.7 in making the minority promotions from the fire lieutenant register, as the underrepresentation of minorities and women in the fire department and the continued validity of the consent decree had been acknowledged by the Eleventh Circuit Court of

Appeals as recently as 1993 in *United States v. City of Miami*, 2 F.3d 1497 (11th Cir. 1993). Finally, the court observed that all of the candidates who were promoted to fire lieutenant passed the examination and were qualified in all respects for promotion.

After reviewing the entire record of the district court proceeding, the Eleventh Circuit Court of Appeals affirmed the decision of the district court, determining that the Firefighters had failed to adduce any evidence to prove that the Rule of Eight or the additional certification provisions of the civil service rules were inappropriately invoked, (App. 2), or that there was any discrimination in the competitive process. (App. 3). The Court of Appeals rejected the Firefighters' conclusory assertion that they were better qualified than the minorities actually promoted, as not being supported by evidence in the record. The Court of Appeals refused to address other arguments made by the Firefighters as constituting disguised collateral attacks on the consent decree in contravention of the Court of Appeals' mandate relating to the prior appeal. (App. 2 n.1).

REASONS FOR DENYING THE WRIT

I.

NEITHER THE RECORD NOR THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS RAISES THE QUESTIONS PRESENTED BY THE PETITION.

The Eleventh Circuit Court of Appeals' decision is plainly correct and is not in conflict with any decisions of this Court or of any circuit court of appeals as to a municipality/ employer's application or implementation of a court-

approved affirmative action plan for making race, sex, and national origin-conscious promotions. Both the consent decree and the City's selection procedures for implementing the promotional goals of the decree have been scrutinized in numerous proceedings which have come before both the United States District Court for the Southern District of Florida and the Eleventh Circuit Court of Appeals over the approximately twenty-year lifespan of the decree. Neither the decree nor the City's selection procedures have been found to offend the United States Constitution or to be inconsistent with the purpose of Title VII. Moreover, Petitioners were expressly precluded in this case from challenging the terms of the decree or from seeking relief from the terms of the decree itself.

In implementing the promotional goals of the consent decree, the City did not use race-based promotional quotas, nor did the City exclude any class of employees from promotion because of race. The City's promotional procedures did not establish "set-asides" for women or other minorities. No such rigid numerical standards or exclusionary practices were utilized in the City's selection procedures. Indeed, Petitioner's use of words such as "quotas," "set-asides," or "exclusion of a class on the basis of race" scattered throughout the Petition in an effort to construct a basis for the question presented are irresponsible and misleading, as there is nothing in the record to support Petitioners' conclusory assertions that the City employed such practices in promoting firefighters to the rank of fire lieutenant.

All those promoted to fire lieutenant were qualified for the position. All had four years of continuous satisfactory service in the rank of firefighter, passed the promotional examination, had their personnel files reviewed, and, in many

instances, were interviewed prior to being selected for promotion. Test score was one of many factors considered, as was race or ethnicity. Petitioner's contention that the white, non-Hispanic Firefighters were entitled to be promoted over the minority candidates who were selected because of their higher test scores disregards the fact that many criteria, including test scores, were considered by the City in making promotion selections. The Firefighters' contention also ignores the validity and purpose of the affirmative action plan for promotions mandated by the consent decree. The consent decree provided a proper rationale for the race and national origin-conscious promotions that were made. *See Johnson v. Transportation Agency*, 480 U.S. 616, 626-627 (1987).

II.

THE ELEVENTH CIRCUIT DECISION DOES NOT CONFLICT WITH ESTABLISHED PRECEDENT OF THIS COURT IN ANY RESPECT.

In an attempt to create a conflict with precedent of this Court where there is none, Petitioners try again to do what they were precluded from doing in both the district court and in their appeal to the Eleventh Circuit, that is, to challenge the legality of the consent decree itself. Unwilling to keep within the legal boundaries established by the Eleventh Circuit in the first appeal, and undaunted by the Eleventh Circuit's admonitions and refusal to consider the Firefighters' disguised collateral attacks on the consent decree in the second appeal, the Firefighters now seek by this Petition to challenge in this Court the legality of the decree. Petitioners' attack on the validity and/or legality of the decree is readily discerned not only in the question

presented for review, but also in the cases upon which Petitioners rely to assert conflict. First, Petitioners discuss decisions of this Court establishing constitutionally permissible standards for governmental action based on race. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989). Petitioners go on to discuss decisions of the Eleventh and Fifth Circuits in which the legality of a particular consent decree or affirmative action plan is being challenged and in which the court's inquiry is necessarily focused on such issues as whether race-based remedies are necessary to remedy past discrimination, or whether there is a strong basis in evidence for minority or gender-based relief, or whether the decree under review is consistent with Title VII's purpose. *See, e.g., Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994) (order modifying consent decrees reversed in part and remanded for determination of whether city and county personnel board had strong evidentiary basis to warrant race-based affirmative action provisions of consent decree and where consent decree was flawed in providing no deadlines for race-based selection procedures and was not sufficiently related to goal of eradicating gender discrimination); *Black Fire Fighters Ass'n. of Dallas v. City of Dallas*, 19 F.3d 992 (5th Cir. 1994) (proposed consent decree which used "skip promotions" to promote blacks over non-blacks who scored higher on promotion exams in violation of equal protection clause rejected). None of these cases involves a discriminatory application or implementation of an affirmative action plan which has already been court-approved and determined necessary to remedy past discrimination. Yet, that was the single issue decided in this case.

Petitioners appear to be unwilling to accept the fact that neither the legality of the consent decree nor of any of its provisions which authorize race and gender-conscious selection procedures for promotions was at issue in the instant case. The Court of Appeals made clear in *Barfus* that the actions of the Firefighters were intended to challenge the City's application or implementation of the consent decree as discriminatory and were not to be used as vehicles to collaterally attack the consent decree itself. As previously stated, the Court of Appeals refused to address many of the arguments made by the Firefighters on appeal (many of which are repeated in the Petition) as being nothing more than disguised attacks on the consent decree.

The record evidence showed that under the City's selection procedures for promotions, race, ethnicity, and gender were but one of several factors used in making promotion selections. Test score was one of the factors. All the applicants who were certified and who competed for promotions were fully qualified for the job. There was no evidence of any inflexible adherence to a numerical standard, no evidence of set-asides or of a racial quota system, no evidence of any other kind of constitutional infirmity illustrated by the cases cited by Petitioners. While Petitioners have continued to denounce in general, conclusory terms the societal evils of race-conscious decision-making and have continued to allege that the City's promotional policy was to intentionally exclude the Firefighters because of their race or ethnicity, they failed to demonstrate to either the district court or to the Court of Appeals any aspect of the City's application or implementation of its affirmative action program which excluded the Firefighters or discriminated against them by denying them the opportunity to compete for promotion. Since the Firefighters failed to prove

discrimination in the City's application or implementation of the decree or promotional procedures, the Eleventh Circuit correctly affirmed the decision of the district court.

CONCLUSION

For the reasons set forth above, the Petition should be denied.

Respectfully submitted,

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